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NO. 87-14

Supreme Court, U.S.
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CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONNA JEAN CHASE, PETITIONER

vs.

A. J. SCHLEUNING, II, M.D., RESPONDENT

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF OREGON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Does Oregon Revised Statute 30.275 establish an arbitrary and irrational scheme for the classification of tort feasors, claims and claimants so as to violate the equal protection clause of the Fourteenth Amendment to the United States Constitution?

NO. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

DONNA JEAN CHASE, PETITIONER

vs.

A. J. SCHLEUNING, II, M.D., RESPONDENT

JURISDICTIONAL STATEMENT/STATE CIVIL CASE

OPINIONS BELOW

The order denying review by the Oregon Supreme Court entered March 24, 1987, the opinion of the Circuit Court entered December 17, 1986, and order of the Circuit Court of Multnomah County, Oregon granting Defendant's motion to dismiss entered October 18, 1985, are set out in the Appendix hereto.

JURISDICTION

This action for money damages in the nature of a medical malpractice suit draws in question the validity of Oregon

Revised Statute 30.275, on the grounds that the classifitory scheme implicit in the statute is repugnant to the equal protection clause of the Fourteenth Amendment to the United States Constitution. The statute in question gives a tort feasor six months in which to file the notice of a claim when injured by a public employee.

The federal constitutional question was timely raised by the Petitioner at the trial court level and has continuously been raised on appeal.

On October 18, 1985, the Circuit Court of Multnomah County, Oregon held for the Respondent, ruling that the tort claim notice provisions of the Oregon Tort Claims Act did not violate either the Oregon Constitution or the United States Constitution. On December 17, 1986, the Oregon Court of Appeals

affirmed per curiam the Circuit Court's decision which granted the Defendant's motion to dismiss. The Court of Appeals, while not addressing the federal constitutional equal protection question that the Plaintiff timely raised, did hold that the tort claims notice provision under ORS 30.275 did not violate Article I Section 20 of the Oregon Constitution. On March 24, 1987, the Oregon Supreme Court entered an order, refusing to hear Plaintiff's petition for review, which had again raised the Federal Constitutional issue.

The jurisdiction of the United States Supreme Court to review the decision of the Supreme Court of Oregon on appeal is conferred by 28 U.S.C. Section 1257(2).

Notice of appeal to this court was timely caused to be filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statute 30.275 is set out in full in the Appendix hereto. In relevant part, the statute provides:

> "...Notice of Claim; Time of Action; (1) no action arising from any acts or omission of a public body or an officer, employer, or agent of a public body, within the scope of ORS 30.260, ORS 30.300, shall be maintained unless notice of

claim is given as part of this section.

2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority or other incapacity. ...(b) for all other claims, within 180 days after the commission of loss or injury."

ORS 30.267 is set out in full in the Appendix hereto. In relevant part the statute provides:

"(1) For the purposes of ORS 30.260 to 30.300, all services constituting patient care, including, but not limited to, in-patient care, out-patient care and all forms of consultation, that are provided on the Oregon Health Sciences University campus or in any Oregon Health Sciences University clinic are within the scope of their state employment or duties when performed by:

(a) salaried physicians or dentists employed at any full time equivalent by the Oregon Health Sciences University."

STATEMENT OF THE CASE

On June 3, 1985, Petitioner filed a complaint in the Circuit Court of Multnomah County, Oregon, alleging that she had been made permanently deaf as a result of ear surgery negligently performed on her by the Respondent on or about January 26, 1984.

Respondent filed a motion to dismiss under ORC 21A(1) on the ground that the court lacked subject matter jurisdiction. Respondent's motion to dismiss was supported by two affidavits which set out the nature and extent of Respondent's practice and employment, and demonstrated that no tort claim notice was filed. Based on the uncontradicted affidavits, the trial court found that all the medical care and treatment provided by the Respondent was within the course and scope of his employment at the Oregon

Health Sciences University, and was part of his official function; the court entered a finding that he was employed by the University on a full time basis. The court also found that the Petitioner had not provided any notice of a tort claim as provided for by the relevant provisions of the Tort Claims Act, ORS 30.275, and therefore, the court went on to uphold the constitutionality of the statutes involved, and allowed the motion to dismiss by Respondent.

On November 29, 1985, the court entered judgment in favor of the Respondent and against the Petitioner.

Petitioner timely filed her appeal to the Oregon Court of Appeals. On December 17, 1986, the Oregon Court of Appeals affirmed the judgment of the Circuit Court of Multnomah County. In a Per Curiam opinion, the Oregon Court of

Appeals upheld the circuit court ruling, while declining to overturn its earlier decision in Brown v. Portland School District, 48 Or.App. 571, 617 P.2d 665 (1980), reversed on other grounds, 291 Or. 77, 628 P.2d 1183 (1981). There, the Court of Appeals stated that the notice requirements of ORS 30.275 did not violate the equal privileges provision of of the Oregon Constitution. Article 1, Section 20 of the Oregon Constitution, provides that:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

The court refused to address Petitioner's properly presented federal question concerning a violation of the equal protection clause of the Fourteenth Amendment.

On March 24, 1987, the Oregon Supreme Court refused to grant a hearing on Petitioner's Petition for Review, thereby denying the petition. This appeal was then taken to the United States Supreme Court.

THE FEDERAL QUESTION IS SUBSTANTIAL

Petitioner, DONNA JEAN CHASE, brought a malpractice action against Respondent, A. J. SCHLEUNING, II, M.D., employed at the Oregon Health Sciences University, as a result of her being deafened by a bone graft performed on her left ear by Dr. Schleuning. Because the doctor was an employee of the Oregon Health Sciences University, ORS 30.267, the tort claim provisions of ORS 30.275 applied and the Petitioner was barred from bringing her claim as the six-month period provided for such claims had already run.

However, the equal protection clause of the Fourteenth Amendment to the United States Constitution forbids the states to deny to any person the equal protection of the law.

Prior to the abrogation of the doctrine of sovereign immunity in American law, tort claimants had no right to sue the state. A plaintiff's right to sue the state for the tortious conduct of a state employee is rather a matter of legislative grace.

> "It is a well established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent or permission; but it may, if it thinks proper, waive this privilege, and permit itself to be made a defendant in a suit by individuals...And as this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the

> suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it." Beers v. Arkansas, 61 U.S. (20 How.), 527, 529, 15 L.Ed. 991 (1895).

Nonetheless, in light of the Equal Protection Clause, a sovereign may not arbitrarily limit or condition the exercise of the right to bring such a suit unless the sovereign advances a rational basis for doing so. Classification..."must be reasonable, not arbitrary, and must rest upon some ground difference having a fair and substantial relation to the object of the legislation so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 243 U.S. 412, 415, 64 L.Ed. 989 40 Sup.Ct. 560 (1920). See also, Reed v. Reed, 404 U.S. 71, 92 S.Ct. 251 (1971),)reaffirming the decision in Royster).

The notice requirement of ORS 30.275(1) provides, in pertinent part, that:

> "No action arising from any act or omission of the public body or an officer, employer, agent of a public body within the scope of ORS 30.260, 30.300, shall be maintained unless notice of the claim is given as required by this section."

The statute generally makes public bodies liable for their torts and those of their employees, ORS 30.265. In addition, the defendant in this case is a beneficiary of ORS 30.267, which brings physicians employed at Oregon Health Sciences University within the protection of the Tort Claims Act for state employees. These statutes, when viewed together, create a two-part classification. Those injured due to the negligence of others have two years in which to bring a claim under the general statute of limitations

in Oregon, ORS 12.110. However, those injured by public employees must file a notice within 180 days of the injury or be forever barred from bringing suit. There is also a sub-classification: doctors in general are subject to suit for two years under ORS 12.110(4), unless the negligence complained of occurred at the Oregon Health Sciences University, in which the notice requirement must be satisfied. The existence of the classification of general claimants and public-body claimants is clear; the latter must perfect their claims by procedures that the former are spared. The special class of medical negligence victims injured at the Health Sciences University is therefore treated differently from other victims of the same torts. Finally, doctors practicing at the university are the beneficiaries

of special immunity not generally available to doctors as a class. The doctor in private practice may receive no notice of a claim until suit is filed, up to two years from the time of injury, or even later under special circumstances, see ORS 12.110(4), while his fellow practitioner at the university must receive notice within 180 days.

The existence of definable classes and/or immunities conferred leads to a second stage analysis that being whether or not the classes and the benefits conferred on such classes are permissible under the equal protection clause of the Fourteenth Amendment. Therefore, the Supreme Court of the United States is the proper forum to address that substantial federal question.

The Oregon Court of Appeals in Brown v. Portland School District No. 1, Supra,

for its part when faced with the notice requirement, ORS 30.275, was unimpressed with the equal protection argument. Judge Joseph, writing for the appellate panel, stated the law correctly and identified rational purposes with the act:

> "The statutory classification will not be set aside if any state of facts reasonably may be conceived to justify.... Among the purposes of notice statutes is to provide the public bodies an opportunity to investigate promptly the merits of the claim and to aid in obtaining liability insurance protection in adjusting claims...those purposes are reasonable, and therefore the notice requirements do not constitute an arbitrary and unconstitutional exercise of legislative power." 48 Or.App. at 576 (citations omitted).

He also noted that derivation of Oregon's act from that of Minnesota and cited position of the Minnesota Supreme Court that the principal purpose of the act is:

> "To protect against dissipation of public funds by requiring that the municipality be promptly furnished with information concerning a claim against it, so that full opportunity is provided to investigate it, to settle those of merit without litigation, and to correct any deficiency in municipal functions revealed by the occurrence period. By timely service of notice, municipalities also afford protection against stale or fraudulent claims or the connivance of corrupt employees or officials." Cypert v. City of Minneapolis, 298 Minn. 35, 213 N.W.2d 605 (1970); cited at 48 Or.App. 576 N.3.

The arguments just given are thoughtful statements of underlying policy which fully support the enactment of some form of statute of limitations to allow potential defendants to investigate the client, to calculate an actuarial risk, to settle meritorious claims, and to protect against stale and fraudulent claims. No purpose is served by contesting the logic or necessity of a

statute of limitations on tort claims. The difficulty, however, arises when one tends to rationalize the creation of the classes, a necessary step in a constitutional equal protection analysis. It is not enough that the underlying social goal has utility; the classes created must be related to a goal. This analysis is missing from the Brown opinion and renders it fatally flawed.

What is there about the investigation of a claim against a public body which renders investigation impractical if notice is not resolved in six months, when private insured routinely are required to conduct claims investigation years after the fact. Surely a six month time limitation to file notice helps to assess and manage risk exposure and thus aids in obtaining insurance. But why is this benefit available only to public

bodies and their employees so as not to afford private employees equal protection under the law?

The arguments so advanced in support of the act do support a time limit, but no argument has been advanced for the creation of a special time limit for public bodies, which is the intent and effect of the act. The arguments advanced do support reasonable protections to be afforded to any defendant, but no argument has been advanced for the creation of special protections for a particular class of defendants.

In the absence of a reasonable justification, the ORS 30.275 notice requirements set up classifications that are impermissible and should be reviewed by this court as to their constitutionality under the equal

protection clause of the Fourteenth Amendment.

AUTHORITY FROM STATE JURISDICTIONS SUPPORT THE FINDING OF AN EQUAL PROTECTION VIOLATION AND IS PERSUASIVE

Some state supreme courts have considered the equal protection arguments advanced here, and agree with them, thereby abandoning the discriminatory class structure of such acts. A review of these cases and their holdings is appropriate.

In Reich v. State Highway Department, 386 Mich. 617, 194 N.W.2d 700 (1972), involving three consolidated accident cases, the Supreme Court of Michigan held that the 60 day notice provision of their state tort claims act which required that governmental tort feasors be given notice of claims, in effect created a special statute of

limitations with respect to actions arising from governmental negligence, and so violated the equal protection guarantees of the state and federal constitutions where the standard negligence action was barred after 3 years.

The court, in speaking to the 60 days notice provision, stated:

> "The object of the legislation under consideration is to waive the immunity of the governmental units and agencies from liability for injuries caused by the negligent conduct, thus putting them on an equal foot with the private tort feasors. However, the notice provisions of the statute arbitrarily split the natural classes, i.e. all tort feasors, into two differently treated sub-classes: private tort feasors, to whom no notice of the claim is owed, and governmental tort feasors, to whom notice is owed.
>
> "The diverse treatment of members of a class along the lines of governmental or private tort feasors bears no

> reasonable relationship under todays circumstances to the recognized purpose of the act. It constitutes an arbitrary and unreasonable variance in the treatment of both portions of one natural class and is, therefore, barred by the constitutional guaranties of equal protection." Reich, Supra at 702.

The court reiterated this reasoning when discussing the two arbitrary classes of victims created by the notice provisions; those victims of government negligence and those of private negligence.

A case that reached an identical result to Reich was Turner v. Staggs, 89 Nev. 230, 510 P.2d 879 (1973) (cert. denied, 414 U.S. 1079, 94 S.Ct. 598 (1973)). Here, the legal guardian of a dead woman's children brought a malpractice action on behalf of the decedent against the Clark County Board of Commissioners and the Southern Nevada Hospital,

its administrator and the doctor who treated the decedent. The complaint was filed just over a year after the decedent's death. It was subsequently dismissed for not being within the six month period allowed for claims against public entities. The Nevada Supreme Court, citing Reich, eschewed judicial restraint as here it could have decided the case on the basis that the children of the decedent, deemed powerless to act, should have been excused during their minority from compliance with the notice provisions. Instead, it went on to decide the case on the ground that the notice requirements of the Nevada Tort claims statute, as applied to governmental torts, denied equal protection guaranteed by the United States Constitution to persons suing government entities. The court, in reaching its decision, stated:

> "Within our present scheme of government, claim statutes serve no real beneficial use (Gruenbau v. City of St. John, Supra) but they are indeed a trap for the unwary. NRS 41.038(1). If we follow Barney, the minor's cause of action would be barred. There would be precluded from enforcement of liability created by statute for their benefit. Such construction of NRS 244.245 creates invidious discrimination and amounts to a denial of due process and equal protection of the law." Turner Supra, at 882.

The case for invalidating tort claims statutes on constitutional Equal Protection grounds was given further forceful articulation by the Supreme Court of Washington in Hunter v. North Mason High School, 85 Wn.2d 810, 539 P.2d 845 (1975).

The Hunter court reasoned that the effect of the statutes is to create two classes of tort feasors, governmental and non-government, and then to allow the one

a procedural advantage not available to the other. 85 Wn.2d at 813. The court stated that non-claim statutes constituted a barrier to a significant number of victims of government malfeasance, Id., and noted that it is "a rare plaintiff who happens to know the short notice period he must comply with, or to consult a lawyer before his time to file has expired." 85 Wn.2d at 814. The court considered and rejected the various grounds asserted by the defendant to distinguish governmental bodies from other private defendants, noting that the interest a party has in prompt settlement, actuarial forecasting, or diligent investigation has nothing to do with whether the party is public or private. 85 Wn.2d 815-817. The court's conclusion was that the only purpose the statute served was protection of the government

from liability for wrongdoing, a protection already waived by the abrogation of sovereign immunity and that therefore the statute couldn't stand. 85 Wn.2d at 818. The Hunter court also made its decision in part on the ground that the abdication of sovereign immunity in Washington was unequivocal; the same is true of Oregon. ORS 30.265 places government and private parties on the same footing.

The Hunter court decided as it did in spite of recent majority dictate to the contrary in the case of Cook v. State, 83 Wn.2d 599, 521 P.2d 725 (1974). In explaining the shift of the court's opinion, Justice Utter indicated that constitutional decision making involves a continuing re-examination of rationales and principles, 85 Wn.2d at 819, and quoted Oliver Wendell Holmes:

> "The present has a right to govern itself, so far as it can...historical continuity with the past is not a duty, only a necessity." O. Holmes, Collected Legal Papers, 139, (1920), 85 Wn.2d at 819.

The same can be said of this court's earlier position in denying certiorari in the case of Turner v. Staggs, Supra. Now is the proper time for the Supreme Court to grapple with these issues and the constitutional principles involved. The earlier refusal to review these issues should not stand in the way of the courts reviewing them now as the present must govern itself.

Finally, in Miller v. Boone County Hospital, 394 N.W.2d. 776, Iowa (1986), a case decided in October of last year, the Iowa Supreme Court reversed a decision it had made 14 years ago and held that the section of the statute governing the tort claims against local governments, which

required that persons claiming damages commence their actions within 6 months after injury, or cause written notice to be sent to local governments within 60 days after their injury, violated equal protection by creating impermissible class of plaintiffs injured by local governments vis-a-vis plaintiffs injured by private tort feasors. This claim began when the plaintiff brought suit against the county hospital for alleged injuries to her son. Summary judgment was granted against her at the trial level on the grounds that she failed to give adequate notice to the government subdivisions involved.

The Supreme Court of Iowa, in reversing the trial court and overruling its earlier decision, conceded that the origins and purpose of notice requirements are rooted in governmental

immunity, adding that the doctrine had been roundly criticized. The Iowa Court quoted with approval the following language:

> "Since governmental immunity eliminates suits against the state for torts which, if committed by a private party, would probably be actionable, it has been characterized as both unjust and incompatible with the American governmental legal system. This characterization is bolstered by three important facts. First, the United States is not governed by a monarch (who the English have said can do no wrong). Second, the American sovereign power belongs not to the government, but to the people. Third, and most important from a legal standpoint, some jurisdictions have openly acknowledged that private citizens have a fundamental right to seek redress in tort from whenever inflicts a wrong including the state." (Note, 60 Cornell Law Review, 417, at 421).

Here, in any case, the legislature had abolished immunity for the state in 1965.

The Iowa court next dealt with plaintiff's main argument, that the notice requirement under Iowa law, 613A.5 violated the equal protection clause of both the United States Constitution and the Iowa State Constitution. The Iowa Court applied the rational basis test where the classification or distinction established by a statute must be related to some legitimate state interest. Any party wishing to upset the classification has a burden of proving the action unconstitutional and must negate every reasonable basis upon which the action may be sustained. The Court reiterated the strong presumption in favor of the constitutionality of any legislative act. In determining whether or not the classification of the statute was arbitrary and reasonable, the court would take into consideration matters of common knowledge

and common import as well as the history of the times.

In its earlier decision upholding its tort claim act, the Iowa Court in Lunday v. Wogleman, 213 N.W.2d. 904, Iowa (1973), stated that the notice requirements of 613A.5 were inacted to protect local government's treasuries from stale claims and to facilitate a prompt settlement of valid claims, the planning of budgets and the repair of defective conditions.

The court now dealt with these four interests one by one.

(1) Stale Claims. While recognizing that local governments had broad exposures here, the court intoned that private entities or persons exposures could easily be greater. "The general statutes of limitations would protect local governments from stale claims in

the same manner as it protects the private sector." See case note, 23 Drake L Rev., Supra, at 705. The odds may even be in favor of local governments, who have police departments, attorneys and other personnel at their disposal to investigate the causes and effects of accidents."

(2) Planning of Budgets. Here, the court again recognized the reality that governments rarely budget for claims, but instead opt out for liability insurance as the statutes permit. The Court said that "insurance is usually purchased because local governments, the private and small populations are unable to use actuarial methods to forecast liabilities and to self-insure." (Emphasis omitted). The public policy of the victorian age, which frowned the idea of insurance, no longer exists. (Citations omitted). A

legislature clearly contemplated local governments would purchase liability insurance to protect themselves. See Iowa Code Sec. 615A.7."

(3) Settling of Valid Claims. The court in rejecting this reason recognized that the extent of a person's injuries is often not known for months and that settlement is unlikely to occur under those circumstances. See Note, 37 Mont.Law.Rev. 206, 214 (1976). "Medicine is not a field with absolutes and has not reached the stage where a physician may always confidently pinpoint the specific injury of a patient, Estate Smith v. Lerner, 37 N.W.2d. 576, 581-582, Iowa (1986), or make an accurate prognosis." (Citations omitted).

(4) Repair Defective Conditions. In dealing with the last reason, the court was not persuaded that the government's

ability to discover and repair defective conditions was in any way tied to a notice in a lawsuit to be filed. "A defective condition should be the government's concern," said the court, "regardless of the threat of a lawsuit." The court reminded the parties that local governments regularly react to such concerns, not on the basis of any 60 day notice statute, but rather through the insurer's prompt and thorough investigation. The injured citizens, however do not consult with an attorney until the 60 days have passed. Moreover, said the court, "if repair of the federal conditions were a legitimate interest, the interest would have required notice of them whenever a person is injured, regardless of the tort feasor or any intent to file a claim." Miller, Supra at 780.

The Iowa Supreme Court, not unlike the Washington Supreme Court in Hunter, admitted in its concluding language that it was not above seeing the issues in a new light:

> "In our quest to seek the illdefined parameters of the equal protection clause, we have re-examined the traditional interest put forth as justification for Section 613A.5, and have found them totally lacking in substance in today's circumstances. We therefore join those jurisdictions that likewise concluded there is no rational basis for legislation like Section 613A.5." Miller Supra at 781."

Each of the four state courts reached its decision on federal constitutional grounds as well as in some instances state constitutional grounds. The courts had stepped into a vacuum created by the Supreme Court's refusal to address the Equal Protection issue as it related to State Tort Claim acts. While

it is not entirely beyond the purview of State Supreme Courts to construe the federal constitution the primary responsibility lies with the Supreme Court of the United States. As such, it is time the United States Supreme Court exercised its dicretion and spoke on this issue in order to remedy any incipient conflicts arising among the various state jurisdictions as to their interpretations of the equal protection clause of the Fourteenth Amendment as it is applied to State Tort Claims Notice Acts.

CONCLUSION

The decision below rendered by the Oregon Court of Appeals upholding the provisions of ORS 30.275 should be summarily reversed with the statute being struck down as inconsistent with the equal protection clause of the Fourteenth

Amendment of the United States Constitution.

Alternatively, this appeal should be accorded plenary review, so the issues raised can be given a full and fair hearing.

Respectfully submitted,

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IN THE COURT OF APPEALS OF
THE STATE OF OREGON

DONNA JEAN CHASE,

Appellant,

v.

A. J. Schleuning II, MD,

Respondent.

(A8506-03464; CA A38129)

Appeal from Circuit Court, Multnomah County.

Charles S. Crookham, Judge.

Argued and submitted October 20, 1986.

David K. Allen, Portland, argued the cause and filed the brief for appellant.

Linda DeVriēs Grimms, Assistant Attorney General, Salem, argued the cause for respondent. With her on the brief were Dave Prohnmayer, Attorney General, and James E. Mountain, Jr., Solicitor General, Salem.

Before Buttler, Presiding Judge, and Warren and Rossman, Judges.

PER CURIAM

Affirmed.

0756N Filed 12/17/86

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Case Name: CHASE V. SCHLEUNING

Appellate case number: CA A 38129

Trial Court or agency case number: A8506-03464

Prevailing party or parties: Respondent

( ) No costs awarded

( ) Costs awarded to the prevailing party or parties, payable by: Appellant

* *

FINAL ORDER*

IT IS ORDERED that on appeal or judicial review the prevailing party or parties recover from

costs and disbursements taxed at $_____, and attorney fees in the amount of $_____ (ORAP 11.03, 11.05, and 11.10.)

IS FURTHER ORDERED that judgment be entered in favor of the Judicial Department and against

in the amount of $_____ for filing fees not waived and unpaid at the time of entry of the final written disposition of this case. ORS21.605.

Date Supreme Court denied review:

DATED: COURT OF APPEALS
(seal)

*This section will be completed when the appellate judgment is prepared. The Records Division of the Office of the State Court Administrator will prepare the appellate judgment, enter it in the appellate register, and mail copies to the parties within the time and in the manner specified in ORAP 11.03(3). See also ORS 19.190(1)

PER CURIAM

In this medical malpractice case, defendant's motion to dismiss was granted, because defendant was an employee of the Oregon Health Sciences University and was in the course and scope of his employment at the time when he performed the allegedly negligent surgery on plaintiff and plaintiff had not given the notice required by ORS 30.275. Plaintiff contends that that notice requirement violates the Equal Privileges provision (Article I, section 20) of the Oregon Constitution.

We decided that question adversely to plaintiff's position in Brown v. Portland School Dist. #1, 48 Or App 571, 617 P2d 665 (1980), rev'd on other grounds 291 Or 77, 628 P2d 1183 (1981). In addition to the equal privileges argument, Brown also involved the question of whether the plaintiff's notice complied with the statute. We held that it did not. On review, the Supreme Court held that the notice substantially complied with the statute and reversed on that ground, without reaching the equal privileges question.

Plaintiff argues that we should overrule the portion of our Brown decision deciding that the tort claims notice provision does not violate Article I, section 20. We declined to do so.

Affirmed.

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

DONNA JEAN CHASE, Plaintiff, v. A. J. SCHLEUNING II, M.D., Defendant.	)	NO. A8506-03464 ORDER GRANTING MOTION TO DISMISS

This matter came before the Honorable Charles S. Crookham on October 18, 1985, upon a Motion to Dismiss filed herein by the defendant. The defendant appeared by and through Rodney K. Norton, Assistant Attorney General. The Court considered the written and oral arguments of the parties, and was fully advised in the premises. Based upon the Complaint and the Affidavits presented by the defendant,

THE COURT FINDS that all medical care and treatment provided by defendant

Schleuning was within the course and scope of his employment at the Oregon Health Sciences University and was part of his official functions which include treating patients and teaching residents at the Oregon Health Sciences University; and

THE COURT FURTHER FINDS that at all material times involving any contact with or medical treatment of the plaintiff, defendant Schleuning was employed by the Oregon Health Sciences University on a full-time basis; and

THE COURT FURTHER FINDS that the plaintiff did not provide any notice of tort claim as required by relevant provisions of the Oregon Tort Claims Act; and

THE COURT FURTHER FINDS that the plaintiff concedes the above findings of fact; and

THE COURT FURTHER FINDS that the tort claim notice provisions of the Oregon Tort Claims Act do not violate either the Oregon Constitution or the United States Constitution. Now, therefore,

IT IS HEREBY ORDERED that defendant's Motion to Dismiss is granted, and

IT IS FURTHER ORDERED that the plaintiff shall file an amended complaint within ten days from the date of this Order; and

IT IS FURTHER ORDERED that if no amended complaint is filed within ten days from the date of this Order, the Court shall enter judgment in favor of defendant.

DATED on _____, 1985.

Charles S. Crookham
Presiding Circuit
Court Judge

Submitted by Rodney K. Norton
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of October, 1985, I served a true copy of the within form of Order Granting Motion to Dismiss which is well founded in law upon plaintiff's attorney, by depositing it in the United States Post Office at Salem, Oregon, postage prepaid, addressed as follows:

David K. Allen, Attorney at Law
2311 East Burnside, Suite 100
Portland, Oregon 97214

RODNEY K. NORTON OSB# 77289
Assistant Attorney General
Of Attorneys for Defendant
450 Justice Building
Salem, Oregon 97310
Telephone: 378-6313

IN THE SUPREME COURT
OF THE STATE OF OREGON

CHASE, DONNA JEAN Petitioner,	)	
v.	)	ORDER DENYING REVIEW
SCHLEUNING, A. J. RESPONDENT	)	CA A38129 SC S33666

The Court has considered the petition for review and ORDERS that it be denied.

DATE: MARCH 24, 1987

EDWIN J. PETERSON
CHIEF JUSTICE

COPIES TO:

ALLEN, DAVID K.
Attorney for: Petitioner

GRIMMS, LINDA DEVRIES
Attorney for: Respondent

IN THE SUPREME COURT
OF THE STATE OF OREGON

DONNA JEAN CHASE, Appellant, vs. A. J. SCHLEUNING, II M.D., Appelles.	)	CA A38129 SC S33666

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that DONNA JEAN CHASE, the appellant above named, hereby appeals to the Supreme Court of the United States from the final order of the Oregon Supreme Court denying review of the earlier decision and thereby affirming that decision entered on March 24, 1987.

This appeal is taken pursuant to 28 U.S.C. 1257(2).

DATED this _____ day of June, 1987.

DAVID H. DeBLASIO, OSB #74-075, for DAVID K. ALLEN OSB #81152 c/o MOZENA & ARMSTRONG, P.S.
2901 Main Street
Vancouver, WA 98663
(206) 695-1677

GS1:bja

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

DONNA JEAN CHASE,	)	
	)	
Appellant,	)	CA A 38129
	)	
vs.	)	SC S33666
	)	
A. J. SCHLEUNING, II, M.D.,	)	
	)	
Appellee.	)	
	)	

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice already having been filed in the Supreme Court of the State of Oregon on June 19, 1987, a copy of which is attached hereto in the Appendix, therefore,

Notice is hereby given that DONNA JEAN CHASE, the Appellant above named, hereby appeals to the Supreme Court of the United States from the final decision of the Court of Appeals of the State of Oregon entered on December 17, 1986, affirming the Multnomah County Circuit

Court's Order Granting Defendant/ Appellee's Motion to Dismiss.

This Appeal is taken pursuant to 28 U.S.C. 1257(2).

DATED this 24th day of June, 1987.

DAVID K. ALLEN
OSB #81152
Attorney for
Appellant

GS1:bja

TORT ACTIONS AGAINST PUBLIC BODIES

30.260 Definitions for ORS 30.260 to 30.300. As used in ORS 30.260 to 30.300, unless the context requires otherwise:

(1) "Department" means the Department of General Services.

(2) "Directors" means Director of the Department of General Services.

(3) "Governing body" means the group or officer in which the controlling authority of any public body is vested.

(4) "Public body" means the state and any department, agency, board or commission of the state, any city, county, school district or other political subdivision or municipal or public corporation and any instrumentality thereof. "Public body" includes any intergovernmental agency, department, council or other like entity which is created under ORS 190.003 to 190.110, and which does not act under the direction and control of any single member government.

(5) "State" means the state or any branch, department, agency, board or commission of the state.

(6) "Local public body" means any public body other than the state. (1967 c.627 §1; 1975 c.609 §11; 1977 c.823 §1; 1961 c.109 §1)

30.265 Scope of liability of public body, officers, employees and agents. (1) Subject to the limitations of ORS 30.260 to 30.300, every public body is liable for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598. As used in ORS 30.260 to 30.300, "tort" includes any violation of 42 U.S.C section 1983.

(2) Every public body is immune from liability for any claim for injury to or death of any person or injury to property resulting from an act or omission of an officer, employee or agent of a public body when such officer, employee or agent is immune from liability.

(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties, or while operating a motor vehicle in a ridesharing arrangement authorized under ORS 276.598, are immune from liability for:

(a) Any claim for injury to or death of any person covered by any workers' compensation law.

(b) Any claim in connection with the assessment and collection of taxes.

(c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused.

(d) Any claim which is limited or barred by the provisions of any other statute.

(e) Any claim arising out of riot, civil commotion or mob action or out of any act or omission in connection with the prevention of any of the foregoing.

(f) Any claim arising out of an act done or omitted under apparent authority of a law, resolution, rule or regulation which is unconstitutional, invalid or inapplicable except to the extent that they would have been liable had the law, resolution, rule or regulation been constitutional, valid and applicable, unless such act was done or omitted in bad faith or with malice.

(4) ORS 30.260 to 30.300 do not apply to any claim against any public body or its officers, employees or agents acting within the scope of their employment arising before July 1, 1968. Any such claim may be presented and enforced to the same extent and subject to the same procedure and restrictions as if ORS 30.260 to 30.300 had not been adopted.

(5) The amendments to ORS 30.270 and 30.285 enacted by Chapter 609, Oregon Laws 1975, do not apply to any claim

against the state or its officers, employees or agents acting within the scope of their employment or duties, arising before July 2, 1975. Any such claim may be presented and enforced to the same extent and is subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted, but the procedure set forth in ORS 278.120 shall be applicable thereto.

(6) ORS 30.287 and the amendments to ORS 30.270 and 30.285 enacted by chapter 609, Oregon Laws 1975, do not apply to any claim against any local public body or its officers, employees or agents acting within the scope of their employment or duties, arising before December 31, 1975. Any such claim may be presented and enforced to the same extent and subject to the same restrictions as if chapter 609, Oregon Laws 1975, had not been adopted. (1967 c.627 §§2, 3, 10; 1969 c.429 §1; 1975 c. 609 §12; 1977 c. 823 §2; 1981 c. 490 §4)

30.266 Liability for damages caused by persons under care of Children's Services Division; conditions; exemptions. (1) Notwithstanding the provisions of ORS 30.285 and 126.080, but subject to the applicable provisions and procedures in ORS 30.260 to 30.300 and 278.100 to 278.135, while the Children's Services Division has the properly granted powers and duties of a custodian or guardian of a minor child, or both, having been so appointed by the court under the provisions of ORS chapter 126 or 419, or having accepted physical

custody of the child by voluntary agreement with the parent under the provisions of ORS 418.015(1), or, pending hearing, the child has been placed in a certified foster home by anyone the division has authorized to do so, the division may be found liable for damages done by such child to other persons or to property, subject to each of the following conditions which shall apply to each claim brought under this subsection:

(a)The child is residing in a foster home certified by the division under the provisions of ORS 418.625 to 418.645, even though the child may be temporarily absent from such home, but is not residing elsewhere with approval of the division;

(b) The damages were in fact done wholly or partly by such child acting singly or in concert with other persons and were done by such child intentionally or wilfully and maliciously; and

(c) The damages are not attributable to any adult in a manner or to a degree that would, in the opinion of the Department of General Services or if necessary as determined by a court of competent jurisdiction, reasonably relieve the child of culpability.

(2)(a) Theft itself shall not be considered damages for the purpose of this section; and

(b) Bodily injury and property damage claims arising out of the operation of a motor vehicle by a foster child are not covered by the provisions of this section.

(3) Nothing in this section shall prevent or inhibit any court of competent jurisdiction from hearing other charges or actions which may be brought against such child, for the acts covered by this section or for others, or from rendering such lawsuit judgments as the court may deem necessary. [1977 c. 781 §2; 1981 c.109 §2]

30.267 Liability for certain medical treatment at Oregon Health Sciences facilities. (1) For the purposes of ORS 30.260 to 30.300, all services constituting patient care, including, but not limited to, inpatient care, outpatient care and all forms of consultation, that are provided on the Oregon Health Sciences University campus or in any Oregon Health Sciences University clinic are within the scope of their state employment or duties when performed by :

(a) Salaried physicians or dentists employed at any full-time equivalent by the Oregon Health Sciences University;

(b) Nonsalaried or courtesy physicians or dentists affiliated with the Oregon Health Sciences University;

(c) Medical, dental or nursing students or trainees affiliated with the Oregon Health Sciences University;

(d) Volunteer physicians or dentists affiliated with the Oregon Health Sciences University; or

(e) Any nurses, students, orderlies, volunteers, aides or employees of the Oregon Health Sciences University;

(2) As used in this section:

(a) "Nonsalaried or courtesy physician or dentist" means a physician or dentist who receives a fee or other compensation for those services constituting patient care which are within the scope of state employment or duties under this section. The term does not include a physician or dentist described under paragraph (a) of subsection (1) of this section.

(b) "Volunteer physician or dentist" means a physician or dentist who does not receive a salary, fee or other compensation for those services constituting patient care which are within the scope of state employment or duties under this section. [1977 c.851 §2]

30.268 Liability for certain medical treatment at facilities other than Oregon Health Sciences University. (1) For the purposes of ORS 30.260 to 30.300, all services constituting patient care, including, but not limited to, inpatient care, outpatient care and all forms of consultation that are provided at a location other than the Oregon Health Sciences University campus or one

of the Oregon Health Sciences University clinics are within the scope of state employment or duties when:

(a) Provided by members of the Oregon Health Sciences University faculty or staff, Oregon Health Sciences University students under prior written express authorization from the President of the Oregon Health Sciences University or his representative to provide those services at that location;

(b) The services provided are within the scope of the express authorization; and

(c) The Oregon Health Sciences University:

(A) Derives revenue in the same amount as it would for fee-for-services care rendered on the Oregon Health Sciences University or at Oregon Health Sciences University clinic; or

(B) Is performing a salaried, non-fee generating or volunteer public community or nonfee-generating educational service by providing the services.

(2) For the purposes of ORS 30.260 to 30.300, services constituting patient care that are provided at a location other than the Oregon Health Sciences University campus or one of the Oregon Health Sciences University clinics are not within the scope of state employment or duties when:

(a) Such services constitute an exclusively private relationship between the patient and a person described in paragraph (a) of subsection (1) of this section; and

(b) The requirements of subsections (b) and (c) of subsection (1) of this section are not met. [1977 c.861 §3]

30.270 Amount of liability. (1) Liability of any public body or its officers, employees or agents acting within the scope of their employment or duties on claims within the scope of ORS 30.260 to 30.300 shall not exceed:

(a) $50,000 to any claimant for any number of claims for damage to or destruction of property, including consequential damages, arising out of a single accident or occurrence.

(b) $100,000 to any claimant for all other claims arising out a single accident or occurrence.

(c) $300,000 for any number of claims arising out of a single accident or occurrence.

(2) No award for damages on any such claim shall include punitive damages. The limitation imposed by this section on individual claimants includes damages claimed for loss of services or loss of support arising out of the same tort.

(3) Where the amount awarded to or settled upon multiple claimants exceeds $300,000, any party may apply to any circuit court to apportion to each claimant his proper share of the total amount limited by subsection (1) of this section. The share apportioned each claimant shall be in the proportion that the ratio of the award or settlement made to him bears to the aggregate awards and settlements for all claims arising out of the occurrence.

(4) Liability of any public body and one or more of its officers, employees or agents, or two or more officers, employees or agents of a public body, on claims arising out of single accident or occurrence, shall not exceed in the aggregate the amounts limited by subsection (1) of this section. [1967 c.627 §4; 1969 c.429 §2; 1975 c.609 §13]

30.275 Notice of claim; time of notice; time of action. (1) No action arising from any act or omission of a public body or an officer, employee or agent or a public body within the scope of ORS 30.260 to 30.300 shall be maintained unless notice of claim is given as required by this section.

(2) Notice of claim shall be given within the following applicable period of time, not including the period, not exceeding 90 days, during which the person injured is unable to give the notice because of the injury or because of minority, incompetency or other incapacity:

(a) For wrongful death, within one year after the alleged loss or injury.

(b) For all other claims, within 180 days after the alleged loss or injury.

(3) Notice of claim required by this section is satisfied by:

(a) Formal notice of claim as provided in subsections (4) and (5) of this section;

(b) Actual notice of claim as provided in subsection (6) of this section;

(c) Commencement of an action on the claim by or on behalf of the claimant within the applicable period of time provided in subsection (2) of this section; or

(d) Payment of all or any part of the claim by or on behalf of the public body at any time.

(4) Formal notice of claim is a written communication from a claimant or representative of a claimant containing:

(a) A statement that a claim for damages is or will be asserted against the public body or an officer, employee or agent of the public body;

(b) A description of the time, place and circumstances giving rise to the claim, so far as known to the claimant; and

(c) The name of the claimant and the mailing address to which correspondence concerning the claim may be sent.

(5) Formal notice of claim shall be given by mail or personal delivery:

(a) If the claim is against the state or an officer, employee or agent thereof, to the office of the Director of the Department of General Services.

(b) If the claim is against a local public body or an officer, employee or agent thereof, to the public body at its principal administrative office, to any member of the governing body of the public body, or to an attorney designated by the governing body as its general counsel.

(6) Actual notice of claim is any communication by which any individual to whom notice may be given as provided in subsection (5) of this section or any

person responsible for administering claims on behalf of the public body acquires actual knowledge of the time, place and circumstances giving rise to the claim, where the communication is such that a reasonable person would conclude that a particular person intends to asset a claim against the public body or an officer, employee or agent of the public body. A person responsible for administering claims on behalf of a public body is one who, as an officer, employee or agent of a public body or as an employee or agent of an insurance carrier insuring the public body for risks within the scope of ORS 30.260 to 30.300, engages in investigation, negotiation, adjustment or defense of claims within the scope of ORS 30.260 to 30.300, or in furnishing or accepting forms for claimants to provide claim information, or in supervising any of those activities.

(7) In an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope of ORS 30.260 to 30.300, the plaintiff has the burden of proving that notice of claim was given as required by this section.

(8) Except as provided in ORS 12.120 and 12.135, but notwithstanding any other provision of ORS chapter 12 or other statute providing a limitation on the commencement of an action, an action arising from any act or omission of a public body or an officer, employee or agent of a public body within the scope

of ORS 30.260 to 30.300 shall be commenced within two years after the alleged loss or injury. [1967 c.627 §5; 1969 c. 429 §3; 1975 c.604 §1a; 1975 c. 609 §14; 1977 c. 823 §3; 1979 c.284 §64; 1981 c.350 §1]

Note: Sections 2 and 4, chapter 350, Oregon Laws 1981, provide:

Sec. 2. The amendments to ORS 30.275 by section 1 or this act do not permit commencement of an action on or after the effective date of this Act in respect to a claim for damages arising out of an accident or occurrence before the effective date of this Act for which notice was not presented before the effective date of this Act as required by ORS 30.275 and the time for presenting that notice prescribed by ORS 30.275 expired before the effective date of this Act.

Sec. 4. This Act takes effect on January 1, 1982.

30.280[1967 c.627 §6; repealed by 1975 c. 609 §25]

30.282 Local public body insurance against liability; payment of assessment to state Liability Fund. (1) The Governing body of any local public body may procure insurance against liability of the public body and its officers, employes and agents acting within the scope of their employment or duties, and in addition to, or in lieu thereof, may establish a self-insurance fund against such liability of the public body and its officers, employes and agents and if the

public body has authority to levy taxes, it may include in its levy an amount sufficient to establish and maintain such a fund on an actuarially sound basis.

(2) Notwithstanding any other provision of law, two or more local public bodies may jointly provide by intergovernmental agreement for anything which subsection (1) of this section authorizes individually.

(3) As an alternative or in addition to establishment of a self-insurance fund or purchase of insurance or both, the governing body of any local public body and the Department of General Services may contract for payment by the public body to the department of assessments determined by the department to be sufficient, on an actuarially sound basis, to cover the potential liability of the public body and its officer, employes or agents acting within the scope of their employment or duties under ORS 30.260 to 30.300, and costs of administration, or to cover any portion of potential liability, and for payment by the department of valid claims against the public body and its officers, employes and agents acting within the scope of their employment or duties. The department may provide public body evidence of insurance by issuance of a certificate or policy.

(4) Assessments paid to the Department of General Services under subsection (3) of this section shall be

paid into the Liability Fund created under ORS 278.100, and claims paid and administrative costs incurred under subsection (3) of this section shall be paid out of the Liability Fund, and moneys in the Liability Fund are continuously appropriated for those purposes. When notice of any claim is furnished as provided in the agreement, the claim shall be handled and paid, if appropriate, in the same manner as a claim against a state agency, officer, employe or agent, without regard to the amount the local public body has been assessed. [1975 c.609 §19; 1977 c.428 §1; 1981 c.109 §4]

30285 Public body shall indemnify public officers; procedure for requesting counsel; extent of duty of state; obligation for judgment and attorney fees. (1) The governing body of any public body shall defend, save harmless and indemnify any of its officers, employes and agents, whether elective or appointive, against any tort claim or demand, whether groundless or otherwise, arising out of an alleged act or omission occurring in the performance of duty.

(2) The provisions of subsection (1) of this section do not apply in case of malfeasance in office or wilful or wanton neglect of duty.

(3) If any civil action, suit or proceedings is brought against any state officer,, employe or agent which on its face falls within the provisions of subsection (1) of this section, or which

the state officer, employe or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, the state officer, employe or agent may, after consulting with the Department of General Services file a written request for counsel with the Attorney General. The Attorney General shall thereupon appear and defend the officer, employe or agent unless after investigation the Attorney General finds that the claim or proceedings that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the Attorney General shall reject defense of the claim.

(4) Any officer, employe or agent of the state against whom a claim within the scope of this section is made shall cooperate fully with the Attorney General and the department in the defense of such claim. If the Attorney General after consulting with the department determines that such officer, employe or agent has not so cooperated or has otherwise acted to prejudice defense of claim, the Attorney General may at any time reject the defense of the claim.

(5) If the Attorney General rejects defense of a claim under subsection (3) of this section or this subsection, or if it is established by the judgment ultimately rendered on the claim that the act or omission complained of was not in

the performance of duty or amounted to wilful or wanton neglect of duty, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employe or agent. Such action by the Attorney General shall not prejudice the right of the officer, employe or agent to assert and establish an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or wilful or wanton neglect of duty, in which case the officer, employe or agent shall be indemnified against liability and reasonable costs of defending the claim, cost of such indemnification to be a charge against the Liability Fund established by ORS 278.100.

(6) If the officer, employe or agent has been defended by the Attorney General and it is established by the judgment ultimately rendered on the claim that the act or omission complained of was not in the performance of duty, the judgment against the officer, employe or agent shall provide for payment to the department of its costs including a reasonable attorney fee.

(7) Nothing in subsection (3), (4), or (5) of this section shall be deemed to increase the limits of liability of any public officer, agent or employe under ORS 30.270, or obviate the necessity of compliance with ORS 30.275 by any claimant, nor to affect the liability of

the state itself or of any other public officer, agent or employe on any claim arising out of the same accident or occurrence.

(8) As used in this section, "state officer, employe or agent" includes district attorneys but does not include any employe of the office of district attorney or of the justice, district or circuit courts whose salary is paid wholly or in part by the county. [1967 c.627 §7; 1975 c.609 §16; 1981 c.109 §5; 1981 c.913 §2]

30.287 Counsel for public officer; when public funds not to be paid in settlement; recovery of attorney fee by public body; effect on liability limit; defense by insurer. (1) If any civil action, suit or proceeding is brought against any officer, employe or agent of a local public body other than the state which on its face falls within the provisions of ORS 30.285 (1), or which the officer, employe or agent asserts to be based in fact upon an alleged act or omission in the performance of duty, he may file a written request for counsel with the governing body of the public body. The governing body shall thereupon engage counsel to appear and defend the officer, employe or agent unless after investigation it is determined that the claim or demand does not arise out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of amounted to malfeasance in office or wilful or wanton neglect of duty, in which case the governing body shall reject defense of the claim.

(2) Any officer, employe or agent of a local public body against whom a claim within the scope of this section is made shall cooperate fully with the governing body and counsel in the defense of such claim. If the counsel determines and certifies to the governing body that such officer, employe or agent has not so cooperated or has otherwise acted to prejudice defense of the claim, the governing body may at any time reject the defense of the claim.

(3) If the governing body rejects defense of a claim under subsection (1) of this section, or if it is established by the judgment ultimately rendered on the claim that the act or omission complained of was not in the performance of duty or amounted to wilful or wanton neglect of duty, no public funds shall be paid in settlement of said claim or in payment of any judgment against such officer, employe or agent. Such action by the governing body shall not prejudice the right of the officer, employe or agent to assert and establish in an appropriate proceedings that the claim or demand in fact arose out of an alleged act or omission occurring in the performance of duty, or that the act or omission complained of did not amount to malfeasance in office or wilful or wanton neglect of duty, in which case he shall be indemnified by the public body against liability and his reasonable costs of defending the claim.

(4) If the officer, employe or agent has been defended by counsel

engaged by the governing body and it is established by the judgment ultimately rendered on the claim that the act or omission complained of was not in the performance of duty or amounted to wilful or wanton neglect of duty, the judgement against the officer, employe or agent shall provide for payment to the local public body its costs including a reasonable attorney fee.

(5) Nothing in subsection (1), (2), or (3) of this section shall be deemed to increase the limits of liability of any public officer, agent or employe under ORS 30.270, or relieve any claimant of the necessity of compliance with ORS 30.275, nor to affect the liability of the local public body itself or of any other public officer, agent or employe on any claim arising out of the same accident or occurrence.

(6) The provisions of this section may be superseded to the extent that the claim against the public officer, employe or agent may be defended by any insurer, or may be subject under ORS 30.282 to agreement with the state Department of General Service, in which case the provisions of the policy of insurance or other agreement are applicable. [1975 c.609 §2]

30.290 Settlement of claims by local public body; approval of court if settlement more than $5,000. The governing body of any local public body may, subject to the provisions of any contract liability insurance existing,

compromise, adjust and settle tort claims against the public body or its officers, employes or agents acting within the scope of their employment for damages under ORS 30.260 to 30.300 and may, subject to procedural requirements imposed by law or other charter, appropriate money for the payment of amounts agreed upon. When the amount of settlement exceeds $5,000, the settlement shall not be effective until approval by the circuit court, unless such settlement is not to be paid from funds of local public body. [1967 c.627 §8; 1975 c.609 §17]

30.295 Payment of judgment or settlement; remedies for nonpayment; tax levy for payment; instalment payments. (1) When a judgment is entered against or a settlement is made by a public body for a claim within the scope of ORS 30.260 to 30.300, including claims against officers, employes or agents required to be indemnified under ORS 30.285, payment shall be made and the same remedies shall apply in case of nonpayment as in the case of other judgments or settlements against the public body except as otherwise provided in this section.

(2) If the public body is authorized to levy taxes which could be used to satisfy a judgment or settlement within the scope of ORS 30.260 to 30.300, and it has, by resolution, declared that the following conditions exist, interest shall accrue on the judgment or settlement, but the same shall not be due and payable until after the canvass and

certification of an election upon a special tax levy for purposes of satisfying the judgment or settlement:

(a) The amount of the judgment or settlement would exceed amounts budgeted for contingencies, tort claims and projected surplus in the current budget;

(b) The amount of the judgment or settlement would exceed 10 percent of the total of the next fiscal year's projected revenues which are not restricted as to use, including the maximum amount of general property tax which could be levied without election but excluding any levy for debt service;

(c) Payment of the judgment or settlement within less than a certain number of years would seriously impair the ability of the public body to carry out its responsibilities as a unit of government; and

(d) The public body has passed an appropriate ordinance or resolution calling a special election to submit to its voters a special levy in an amount sufficient to satisfy the judgment or settlement.

(3) A certified copy of the resolution provided for in subsection (2) of this section shall be filed with the clerk of the court in which an order permitting instalment payments could be entered.

(4) If the public body is not authorized to levy taxes as provided in subsection (2) of this section, and it has, by resolution, declared that the applicable conditions specified in paragraphs (a) to (c) of subsection (2) of this section exist, it may petition for an order permitting instalment payments as provided in subsection (6) of this section.

(5) The provisions of subsections (2) and (4) of this section do not apply to the State of Oregon; provided, however, that if the conditions specified in subsection (4) of this section exist, the secretary of state may, under seal of the State of Oregon, attest thereto in lieu of a resolution, and the State of Oregon may thereafter petition for an order permitting instalment payments as provided in subsection (6) of this section.

(6) If the procedure specified in subsection (2) to (5) of this section has been followed, and, with respect to public bodies subject to subsection (2) of this section, the tax levy failed, the public body may petition for an order permitting instalment payments. The petition shall be filed in the court in which judgment was entered or, if no judgment has been entered, it shall be filed in the circuit court of the judicial district in which the public body has its legal situs. Petitions by the State of Oregon where no judgment has been entered shall be filed in Marion County Circuit Court.

(7) The court in which a petition is filed shall order that the judgment or settlement be paid in quarterly, semiannual or annual instalments over a period of time not to exceed 10 years. The court shall determine the term of years based upon the ability of the public body to effectively carry out its governmental responsibilities, and shall not allow a longer term than appears reasonably necessary to meet that need. The order permitting instalment payments shall provide for annual interest at the judgment rate. [1967 c.627 §9; 1977 c.823 §4]

30.300 ORS 30.260 to 30.300 exclusive. ORS 30.260 to 30.300 is exclusive and supersedes all home rule charter provisions and conflicting laws and ordinances on the same subject. [1967 c.627 §11]

§1257 U.S.C.A. State courts; appeal; certiorari:

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

> "...(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."